



The Commonwealth of Massachusetts

**DEPARTMENT OF
TELECOMMUNICATIONS AND ENERGY**

September 16, 2005

D.T.E. 05-27

Investigation by the Department of Telecommunications and Energy on its own motion pursuant to General Laws c. 164, § 94, and 220 C.M.R. §§ 5.00 et seq. as to the propriety of the rates and charges set forth in the following tariffs: M.D.T.E. Nos. 34 through 68, filed with the Department on April 27, 2005 by Bay State Gas Company.

INTERLOCUTORY ORDER REGARDING THE APPEAL OF ATTORNEY GENERAL ON
THE HEARING OFFICER'S RULING GRANTING FULL PARTY STATUS TO KEYSpan
ENERGY DELIVERY NEW ENGLAND, NSTAR GAS COMPANY,
BOSTON EDISON COMPANY, CAMBRIDGE ELECTRIC LIGHT COMPANY, AND
COMMONWEALTH ELECTRIC COMPANY

APPEARANCES: Robert L. Dewees, Jr., Esq.
Nixon Peabody LLP
100 Summer Street
Boston, Massachusetts 02110

-and-

Patricia French, Esq.
NiSource Corporate Services
Legal Department
300 Friberg Parkway
Westborough, Massachusetts 01581
FOR: BAY STATE GAS COMPANY
Petitioners

Thomas F. Reilly, Attorney General

By: Jennifer Cargill, Esq.
Alexander Cochis, Esq.
Colleen McConnell, Esq.
Karlen Reed, Esq.
Assistant Attorneys General

Office of the Attorney General
One Ashburton Place
Boston, Massachusetts 02108

Intervenor

Robert R. Ruddock, Esq.
Associated Industries of Massachusetts
222 Berkeley Street, 13th Floor
Boston, Massachusetts 02117-0763

Intervenor

Rachel Graham Evans, Esq.
Robert Sydney, Esq.
Commonwealth of Massachusetts
Division of Energy Resources
100 Cambridge Street, Suite 1020
Boston, Massachusetts 02114

Intervenor

Robert Keegan, Esq.
Cheryl Kimball, Esq.
Keegan Werlin LLP
265 Franklin Street, 6th Floor
Boston, Massachusetts 02110-3113

-and-

Thomas P. O'Neill, Esq.
Senior Counsel
KeySpan Energy Delivery New England
52 Second Avenue
Waltham, Massachusetts 02451

FOR: KEYSpan ENERGY DELIVERY NEW ENGLAND

Intervenor

Charles Harak, Esq.
77 Summer Street, 10th Floor
Boston, Massachusetts 02110
FOR: LOCAL 273, UTILITY WORKERS OF AMERICA,
AFL-CIO
Intervenor

Jerrold Oppenheim, Esq.
57 Middle Street
Gloucester, Massachusetts 01930-5736
FOR: LOW-INCOME WEATHERIZATION AND FUEL
ASSISTANCE PROGRAM NETWORK,
MASSACHUSETTS ASSOCIATION FOR
COMMUNITY ACTION, and
MASSACHUSETTS ENERGY DIRECTORS
ASSOCIATION
Intervenors

Emilio A.F. Petroccione, Esq.
Roland, Fogel, Koblenz and Petroccione, L.L.P.
One Columbia Place
Albany, New York 12207
FOR: MASSACHUSETTS OIL HEAT COUNCIL, INC.
Intervenor

Rebecca L. Tepper, Esq.
John DeTore, Esq.
Rubin and Rudman LLP
50 Rowes Wharf
Boston, Massachusetts 02110
FOR: MASSPOWER
Intervenor

David Rosenzweig, Esq.
Robert Werlin, Esq.
Keegan Werlin LLP
265 Franklin Street, 6th Floor
Boston, Massachusetts 02110-3113
FOR: NSTAR GAS COMPANY,
BOSTON EDISON COMPANY,
CAMBRIDGE ELECTRIC LIGHT COMPANY, and
COMMONWEALTH ELECTRIC COMPANY
Intervenors

Nicole Horberg Decter, Esq.
Pyle, Rome, Lichten & Ehrenberg, P.C.
18 Tremont Street, Suite 500
Boston, Massachusetts 02108
FOR: UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC
Intervenor

James Avery, Esq.
Brown, Rudnick, Berlack, Israel
1 Financial Center
Boston, MA 02111
FOR: THE BERKSHIRE GAS COMPANY
Limited Participant

Gary Epler, Esq.
Senior Regulatory Counsel
Unitil Service Corporation
6 Liberty Lane West
Hampton, New Hampshire 03842
FOR: FITCHBURG GAS AND ELECTRIC LIGHT
COMPANY
d/b/a UNITIL
Limited Participant

Kevin Penders, Esq.
New England Gas Company
100 Weybosset Street
Providence, Rhode Island 02903
Limited Participant

Stephen Klionsky, Esq.
Northeast Utilities Services Company
101 Federal Street, 13th Floor
Boston, Massachusetts 02110
FOR: WESTERN MASSACHUSETTS ELECTRIC
COMPANY
Limited Participant

I. INTRODUCTION

On April 27, 2005, Bay State Gas Company (“Bay State”) petitioned the Department of Telecommunications and Energy (“Department”) for approval of tariffs designed to:

(1) collect additional revenues of \$22.2 million; (2) establish a performance-based regulation plan (“PBR Plan”); (3) implement a pension/post-retirement benefits other than pension (“PBOP”) reconciliation adjustment proposal; and (4) establish a rate recovery mechanism for replacement of steel mains. The Department docketed the petition as D.T.E. 05-27. The Department held public hearings on May 25, 2005 in Ludlow, May 26, 2005 in Brockton, and on May 31, 2005 in Andover.

On May 6, 2005, the Attorney General of the Commonwealth of Massachusetts (“Attorney General”) filed a notice of intervention pursuant to G. L. c. 12, § 11E. Additionally, on May 24, 2005, the Hearing Officer granted intervenor status to Associated Industries of Massachusetts; Local 273, Utility Workers Union of America, AFL-CIO; United Steelworkers of America AFL-CIO-CLC; and limited participant status to Western Massachusetts Electric Company. On June 2, 2005, the Hearing Officer granted intervenor status to Commonwealth of Massachusetts Division of Energy Resources; KeySpan Energy Delivery New England (“KeySpan”); Low-Income Weatherization and Fuel Assistance Program Network; Massachusetts Association for Community Action; Massachusetts Energy Directors Association; Massachusetts OilHeat Council, Inc.; MASSPOWER; NSTAR Gas Company, Boston Edison Company, Cambridge Electric Light Company, Commonwealth Electric Company (collectively “NSTAR”); and limited participant status to New England Gas

Company and Fitchburg Gas and Electric Light Company d/b/a Unitil. On June 14, 2005, the Hearing Officer granted limited participant status to The Berkshire Gas Company.

II. PROCEDURAL HISTORY REGARDING KEYSPAN AND NSTAR'S PETITIONS TO INTERVENE

On May 26, 2005, KeySpan and NSTAR (together "Companies") each filed petitions to intervene ("KeySpan Petition to Intervene," "NSTAR Petition to Intervene"). The Hearing Officer established a five-day deadline for all objections to these petitions to intervene. No objections were filed by that date (June 1, 2005).¹

The Department held a procedural conference on June 2, 2005 during which, over the objections of the Attorney General, the Hearing Officer granted KeySpan and NSTAR full party intervention status (Tr. at 42).² On June 3, 2005, the Attorney General appealed the Hearing Officer's grant of full party status to KeySpan and NSTAR ("Attorney General Appeal"). On June 6, 2005, KeySpan and NSTAR filed oppositions to the Attorney General Appeal ("KeySpan Opposition" and "NSTAR Opposition," respectively). On June 7, 2005, the Attorney General filed a response to KeySpan and NSTAR's oppositions ("Attorney General Response"). On June 9, 2005, Bay State filed a response to the Attorney General Appeal ("Bay State Response").

¹ The Memorial Day holiday on May 31, 2005 extended the deadline one day.

² The Hearing Officer indicated that the Attorney General's objection was untimely (Tr. at 42).

III. SUMMARY OF APPEAL AND OPPOSITIONS

A. Attorney General's Appeal

The Attorney General asserts that his opposition was timely under 220 C.M.R. §§ 1.06(6)(d)(3), 1.02(4), and 1.03(1)(d), and that by granting full intervention status to KeySpan and NSTAR the Hearing Officer complicates the proceedings and places an additional burden on his preparation plans (Attorney General Appeal at 1-3). The Attorney General admits he initially assented to KeySpan's intervention, but learned on May 31, 2005 that KeySpan would likely sponsor witnesses during evidentiary hearings (id. at 3). The Attorney General contends that the proceedings will be complicated by adding, as full parties, utility companies that may sponsor witnesses (id. at 2-3). The Attorney General maintains that further burdening the procedural schedule will interfere with his ability to prepare his case, present evidence, and cross-examine witnesses (id. at 3). Instead, the Attorney General asserts that KeySpan should file a separate proceeding to address any unique factual issues pertaining to its interests (id. at 3; Tr. at 14).

The Attorney General maintains that his alleged untimeliness was the Hearing Officer's only stated reason for granting full party intervention status to KeySpan and NSTAR (Attorney General Appeal at 3). The Attorney General claims that because his opposition was filed within the period allowed under 220 C.M.R. § 1.02(4), the Hearing Officer exceeded her authority when she directed that oppositions to motions to intervene be filed by May 31, 2005 (Attorney General Response at 1). The Attorney General claims that pursuant to 220 C.M.R. §§ 1.02(4), 1.02(5), 1.03, and 1.06(6)(b), the Hearing Officer is not permitted to

alter the method of calculating time or establish a schedule that is not “necessary and practicable” (id. at 1). The Attorney General asserts that the Hearing Officer’s May 31, 2005 deadline to oppose any interventions was not “necessary and practicable” (id.). Accordingly, the Attorney General requests that the Department should reverse the Hearing Officer’s ruling and deny KeySpan and NSTAR full party intervenor status (id. at 3-4).

B. KeySpan and NSTAR’s Oppositions to Attorney General’s Appeal

KeySpan and NSTAR claim that the Attorney General’s appeal is without merit, mischaracterizes facts, and should be rejected. KeySpan and NSTAR assert that the Hearing Officer correctly used her discretion in setting the May 31, 2005 deadline for oppositions to interventions, and therefore, the Attorney General’s opposition was untimely. Further, the Companies note that the Attorney General does not refute that KeySpan or NSTAR are “substantially and specifically affected” by the proceeding (KeySpan Opposition at 3-4; NSTAR Opposition at 3-4).

KeySpan and NSTAR state that their petitions to intervene meet the Department’s full intervention standard because each company: (1) is substantially and specifically affected by the proceeding’s findings and unique precedential effects; (2) needs the opportunity to protect rights that cannot be adequately represented by any other party; and (3) has additional evidence, knowledge, and experience that will help to elucidate the issues of the proceeding and serve the public interest in establishing a clear and thorough record (KeySpan Petition to Intervene at 2-4; NSTAR Petition to Intervene at 3-4; KeySpan Opposition at 1-2; NSTAR Opposition at 1-2). The Companies also claim that their interventions are consistent with the

Department's long-standing practice of permitting the full intervention of utilities in such general rate cases (KeySpan Opposition at 1; NSTAR Opposition at 1). KeySpan contends that, as it is substantially and specifically affected by this proceeding, the record should not be deprived of the information that it might present and that the Attorney General can object to any of the information presented (KeySpan Opposition at 3).

C. Bay State Response

Bay State asserts that it is consistent with Department practice to permit full intervention for gas and electric companies in rate proceedings (Bay State Response at 1). Bay State claims that Department rate orders directly affect all gas and electric companies, not just the petitioning company (*id.*, citing Fitchburg Gas and Electric Light Company, D.T.E. 02-24/25, at 245 (2002); Boston Gas Company, D.T.E. 03-40, at 376 (2003)). Furthermore, Bay State argues that KeySpan and NSTAR may possess evidence and experience that would assist the Department in considering the issues in this case (*id.*).

IV. ANALYSIS AND FINDINGS

The question before us is whether, by requiring that oppositions to petitions to intervene be filed by May 31, 2005,³ the Hearing Officer acted within the authority delegated under G. L. c. 25, § 4. The Commission has broad discretion in the exercise of its authority

³ The Department's Procedural Rules provide for an answer to a petition to intervene to be filed within five days after the petition is filed. See 220 C.M.R. § 1.03(1)(d). However, in computing time, when the time period is five days or less, intervening Saturdays, Sundays and legal holidays are excluded in the computation. See 220 C.M.R. § 1.02(4). Between May 26, 2005 and May 31, 2005, there were an intervening Saturday, an intervening Sunday, and an intervening legal holiday.

under G. L. c. 30A, § 10 over petitions to intervene. See, e.g., Tofias v. Energy Facilities Siting Board, 435 Mass. 340, 345 (2001); New England Telephone and Telegraph Company, D.P.U. 89-300, at 5 (1990). That same Commission discretion inheres in the delegation made to the Hearing Officer in this proceeding on May 9, 2005 pursuant to G. L. c. 25, § 4. The Department has held that a Hearing Officer has the authority to conduct the proceeding in an efficient manner and to make decisions regarding procedural matters that may arise during the course of the evidentiary hearings. See, e.g., Tofias, 435 Mass. at 349-50. Where there is no evidence that the Hearing Officer abused his or her discretion in ruling on a pleading, motion, petition, or request, the decision of the Hearing Officer must be affirmed. Verizon New England, D.T.E. 01-20, Interlocutory Order on CLEC Coalition's Appeal of Hearing Officers' May 18, 2002 Ruling at 7-9 (2001).

In this case, the Attorney General objects to the Hearing Officer's determination allowing KeySpan and NSTAR to be full party intervenors. The Attorney General states that his objection was timely and in accordance with the time standards specified in 220 C.M.R. §§ 1.06(6)(d)(3), 1.02 (4), and 1.03(1)(d). Moreover, the Attorney General speculates that the Companies' participation may complicate the proceeding and interfere with his ability to prepare his case, present evidence, and cross-examine witnesses (Attorney General Appeal at 2-3; Tr. at 14).⁴

⁴ The Attorney General fails to refute or even address other factors relevant to the Hearing Officer's consideration of the Companies' petitions to intervene, i.e., that the Companies are substantially and specifically affected by the proceeding and that the Companies' additional testimony will help elucidate issues in the proceeding.

Considering the six-month statutory deadline under G. L. c. 25, § 18, and the complicated nature of this matter (see Attorney General Appeal at 2-3), however, the Department finds that the Hearing Officer acted properly in endeavoring to set an efficient schedule and did not abuse her discretion when she established a five-day period within which to file an objection to the Companies' petitions to intervene. See 220 C.M.R. §§ 1.06(6)(a)-(b). The time to object to the Hearing Officer's varying the customary period was at the time the variation was announced, not when it was enforced. Because no objections to the petitions to intervene were filed within the time period set by the Hearing Officer, she properly rejected as untimely the Attorney General's objection at the procedural conference.

We also address certain other arguments advanced by the Attorney General in his appeal. First, the Attorney General maintains that "[a]dding utility companies, as full party intervenors, that may have plans to sponsor witnesses will complicate the proceedings" (Attorney General Appeal at 2-3 (emphasis added)). It is not valid for a party to claim that a petitioner, who meets the statutory standard for party status, ought to have his intervention right diminished on the grounds that the petitioner may "complicate a proceeding" by sponsoring a witness in the course of asserting his party rights. Witness sponsorship is an intrinsic incident of party status (see G.L. c. 30A, § 11(3)), not a basis for objecting to an intervention petition.

The Attorney General further asserts that the petitions for intervention should be denied because "[n]one of the other utilities . . . have sought full intervenor status" id. at 3. The

abstinence of other utilities can have no relevance to the merits of KeySpan's or NSTAR's petitions. Those are judged and allowed on their merits.

The Attorney General also maintains that “[f]urther burdening this procedural schedule will interfere with the Attorney General's ability to prepare his case, present evidence and cross examine witnesses” id. (emphasis added). We leave aside the impracticability of deeming some petitions burdensome or interfering. The statutory standard governing intervention in an adjudicatory proceeding is “substantially and specifically affected” (see G.L. c. 30A, § 10). This objection of “burdening” or “will interfere” was not raised with respect to other petitions. There is no hierarchy of rights of litigants whereby one admitted party (in this case by statutory right, G.L. c. 12, § 11E) may validly object to another's petition on the grounds that its allowance may impinge upon (“interfere”) his ability to make his case.

For all the reasons stated in this Order, we find that the Hearing Officer properly exercised her broad discretion in granting KeySpan and NSTAR full party intervenor status in D.T.E. 05-27. Therefore, we deny the Attorney General Appeal.

V. ORDER

Accordingly, after due consideration, it is

ORDERED: That the appeal of the Attorney General of the Commonwealth of Massachusetts to reverse the Hearing Officer’s ruling granting full party status to intervenors KeySpan Energy Delivery New England, NSTAR Gas Company, Boston Edison Company,

Cambridge Electric Light Company, and Commonwealth Electric Company be, and hereby is,
DENIED.

By Order of the Department,

/S/

Paul G. Afonso, Chairman

/S/

James Connelly, Commissioner

/S/

W. Robert Keating, Commissioner

/S/

Judith F. Judson, Commissioner